IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14348 of 1993
with
CIVIL REVISION APPLICATION NO.727 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE

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KANTILAL RAMBHAI PATEL & ORS

Versus

THE STATE OF GUJARAT & ORS

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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Appearance:

MR S.B. VAKIL WITH MR RAVI R TRIPATHI for Petitioner
M/S PURNANAND & CO for Respondent No. 1

CORAM : MR.JUSTICE H.L.GOKHALE
Date of decision: 10/07/96

ORAL COMMON JUDGEMENT

The petitioners in Special Civil Application No.14348 of 1993 are respondents No.1 in Civil Revision Application No.727 of 1995. They are land developers and/or builders. The first petitioner in Civil Revision No.727 of 1995 is a cooperative housing society which has been allowed to be joined in Special Civil Application No.14348 of 1993 on its application (being Civil Application No.2124 of 1995 as an added respondent. Since the principal dispute in these two matters is between the petitioners in Special Civil Application No.14348 of 1993 and this society concerning certain action on the part of the State Government in favour of the society (and corresponding civil litigation between the petitioners in Special Civil Application No.14348 of 1993 and the society on the other hand) both these matters were directed to be heard together and are being disposed of by this common judgment.

2 The petitioners in Special Civil Application No.14348 of 1993 are partners of one M/s Bhagawati Corporation (hereinafter referred to as "the developers") which is dealing in construction work. Mr A.J. Patel, senior advocate, and Mr Ravi Tripathi have represented the developers. Mr S.B. Vakil, senior advocate, has represented the society in Special Civil Application No.14348 of 1993. Mr M.C. Bhatt has represented the same society in Civil Revision Application No.727 of 1995. The State of Gujarat and its officers have been represented by Mr Lathigara and AUDA (Ahmedabad Urban Development Authority) has been represented by Mr P.S. Champaneri. AUDA is the development authority for the Vejalpur area amongst others under the Gujarat Town Planning & Urban Development Act, 1976 (hereinafter referred to as the Planning Act for brevity). All the learned counsels have taken me through the record of the case as well as the relevant provisions of the law and authorities.

3 The main contention of the developers is that they are the purchasers of 3 different parcels of land out of original survey no.96 situated at village Vejalpur on the outskirts of Ahmedabad. The three parcels totally admeasure about 2,417 square yards. It is their case that they purchased these lands from one Gangaram Suthar on 28th December 1981. It is their further case that when the relevant town planning scheme for the said village (now a municipality) was prepared and sanctioned, their interests have come to be affected inasmuch as the original parcel of the land came to be subdivided into

two parts, namely, 51 and 148. The Plot No.51 came to be allotted to the society whereas the interests of the developers came to be accommodated in the remaining portion which was numbered as 148. Incidentally, it is relevant to note that the new plot no.51 is created by merging some parcels of another adjoining part of land also. The submission of the developers is that in plot no.148 there are already some constructions belonging to one Neha Park Society and there is hardly any open space now left for the developers.

4 It is the further case of the developers that since their interests were so ignored, they had filed one Special Civil Application No.2263 of 1989 earlier and in that petition certain directions came to be passed by a Division Bench on 25.7.1991. That order records the statement of Mr Patel, appearing on behalf of the developers in that matter, that the developers would like to represent before the Town Planning Officer on or before 30th July 1991 that they may be given separate final plot or subdivided demarcated share in final plot no.148. Considering the fact that the scheme was prepared way back in 1981, the Division Bench directed the Town Planning Officer concerned to forward the representation of the developers to the State Government for appropriate modification of the preliminary town planing scheme which was pending before the State Government for sanction under section 65 of the Town Planning Act. The Court directed the State Government to consider and decide the said representation and in view of the said direction the petition came to be withdrawn.

5 It is the case of the developers that thereafter they represented to the concerned Town Planning Officer on 30th July 1991 followed by a reminder on 5th February 1993. Thereafter an order has come to be passed by the State Government on 8th December 1993 (signed by the Section Officer, Urban Development and Urban Housing Department) rejecting the said representation and finalising the scheme. That order has been challenged in this Special Civil Application No.14348 of 1993.

6 After joining into this Special Civil Application an affidavit-in-reply was filed by one Mr.Nilesh Maniar, Secretary of the Cooperative Society on 30th November 1995. One Shri J.A. Dave, Senior Town Planning Officer has also affirmed a reply on 12th September 1994. The main submissions on behalf of the developers are that whereas an open plot has allegedly been taken away from them, they are given a portion in the final plot no.148

which is already constructed upon to a large extent and this is impermissible. The second submission which is now taken on 26th February 1996 by way of an amendment for the first time is to allege that the impugned action is a motivated one for the benefit of Neha Park Society. The third submission is that the developers have not been properly heard at the relevant stage. As far as the first submission with respect to being compressed into a plot of land where there had already been some constructions is concerned, what is material to note is that the admitted case of the developers is that they have purchased 3 parcels of land on 28th December 1981. Though the developers have tried to refer to some Banakhat (agreement to sell) entered into in the year 1975, the said document has not been produced on record anywhere. What is material further to note is that the preliminary town planning scheme has been approved on 31st July 1981. Obviously the purchase of 28.12.1981 is subsequent to the scheme. If that is so, no fault can be found with respect to the decision of the Government under section 65 of the Act where it is in terms recorded that the concerned land has been purchased by the developers, obviously, after the preparation of the preliminary town planning scheme. Mr Patel learned counsel appearing for the developers relied upon the judgment of the Supreme Court in the case of Municipal Corporation of Greater Bombay v. Advance Builders reported in AIR 1972 SC 793 and particularly para 10 thereof to contend that it was the responsibility of the Planning authority to remove the encroachments etc and to give the owner of the land a vacant alternative land where a redistribution of plots takes place. In the instant case however this judgment will not help Mr Patel for the reason that when the preliminary scheme was framed the developers were not owner of the plot concerned. They have purchased the land subsequent thereto. They cannot insist on getting vacant land for alleged ouster from the land.

7 The impugned order also notes that in fact the developers had consented to the finality of the preliminary scheme on behalf of the original owner. Mr Patel and Tripathi dispute this statement appearing in the impugned order. Even if one decides to ignore this statement, what is material is that the earliest representation of the developers in this behalf is dated 5th February 1984. If it is the case of the developers that they have purchased the interest in the land in 1975 they were expected to object to the same at the proper stage at the time when the preliminary scheme was prepared. The first objection, as noted above, is nearly

3 years after the preparation of the preliminary scheme and that too on the basis of the document which is effected on 28.12.1981 i.e. subsequent to the preparation of the preliminary scheme. The Government Order also refers to the fact that the portion of the land has been declared to be surplus under the Urban Land (Ceiling and Regulation) Act, 1976, (hereinafter referred to as the Ceiling Act) and that aspect will be referred to by me a little later. As far as the submission that the actions of the Government are motivated in the interest of Neha Park Society is concerned, the same does not deserve to be entertained for the simple reason that it has been made by way of amendment for the first time in the month of February 1996 and no material is placed on record to substantiate this allegation.

8 The third submission is that adequate hearing has not been given or that personal hearing ought to have been given. Rule 26(3) of the Gujarat Town Planning Rules has been pressed into service in this behalf. It reads as follows:

> "(3) The Town Planning Officer shall, before proceeding to deal with matters specified in Sec. 52, publish a notice in Form-H in the Official Gazette and in one or more Gujarati newspapers circulating within the area of the appropriate authority. Such notice shall specify the matters which are proposed to be decided by the Town Planning Officer and State that all persons who are interested in the plots or are affected by any of the matters specified in the notice shall communicate in writing their objections to the Town Planning Officer within a period of twenty days from the publication of notice in the Official Gazette. Such notice shall also be posted at the office of the Town Planning Officer and of the appropriate authority and the substance of such notice shall be posted at convenient placed in the said locality."

That is concerning the steps to be taken under section 52 of the Planning Act while framing the preliminary scheme. The rule provides for publication of the notice in newspapers specifying the matters proposed to be decided by the Town Planning Officer. In the instant case we are concerned with the later stage under section 65 of the Planning Act. The representations, made by the developers pursuant to order of the High Court passed earlier, for the consideration by the Government under section 65 of the Planning Act have

specifically been referred to in the Reference column at the beginning of the impugned order dated 8th December 1993 and that order has dealt with the submissions made in the representation. Mr Vakil, the learned counsel for the society, drew my attention to a Division Bench judgment of this Court in the case of Kashiben v. State of Gujarat, reported in 1989 (2) GLR at page 1176 wherein the Division Bench has quoted the observations of the decision of a Full Bench with respect to hearing under the above referred rule 26 (3). The Full Bench had held that provision of Rule 26(3) of the Rules was an additional safeguard for the individual and a breach thereof could not constitute a minimum essential of the scheme. The relevant observations of the Full Bench in this behalf quoted with the approval by the Division Bench are as follows:

"So far as the validity of such legislative measure is concerned, the validity can be gone into even in writ jurisdiction only to the limited extent whether there is any transgression of jurisdiction of the authorities concerned and whether the scheme as finally emerged is totally inconsistent with the Act. It is only the fundamental breaches, that is where minimum statutory essentials are not complied with, which result in a total lack of jurisdiction and not other procedural errors or defects that would render a scheme, which had become a legislative measure and a part of the Act, liable to attack or challenge in a Court on the ground that it is null and void.

xxx it was open to a person affected to waive individual special notice specified in sub-rule (3), which was only as an additional safeguard for the individual concerned. Therefore, that could never constitute the minimum essential of the scheme or such a basic requirement that its non-compliance would have nullifying consequences."

If this is the position with respect to hearing at the stage of framing of preliminary scheme under section 52 of the Planning Act, one cannot read much into the provisions of Section 65 of the Act. It cannot be said that there was any denial of principles of natural justice in passing the impugned order or in the manner in which it has been passed. Mr Vakil, learned counsel for the society, also pointed out that in the instant case reference to the provisions of the Ceiling Law made by

the State Government would be appropriate. Under section 3 of the Ceiling Act, no person is entitled to hold any vacant land in excess of the ceiling limit. He is required to file a statement with respect to his land holding and has to wait for the declaration of the competent authority with respect thereto. In the instant case, the statement filed by the original owner, Gangaram Suthar in the year 1976, came to be disposed of on 18th September 1982. The sale deed executed in favour of the developers in December 1981 during the intervening period is therefore hit by Section 5(3) of the Ceiling Act. Section 5 (3) of the said Act reads as follows:

> "5(3) In any State to which this Act applies in the first instance and in any State which adopts this ACt under Cl. (1) of Art. 252 of the Constitution, no person holding vacant land in excess of the ceiling limit immediately before the commencement of this Act shall transfer any such land or part thereof by way of slae, mortgage, gift, lease or otherwise until he has furnished a statement under Sec. 6 and a notification regarding the excess vacant land held by him has been published under sub-section (1) of Sec. 10; and any such transfer made in contravention of this provision shall be deemed to be null and void."

9 Mr Patel learned counsel for the developers submitted that this embargo under section 5(3) of the Ceiling Act ought to be considered as only one for the purposes of the Ceiling Act and also that it ought to be related to the provision with respect to calculations as obtained under section 4(4)(a) of the said Act. Mr Vakil, learned counsel for the society, submitted that section 4(4)(a) relates to the period prior to the appointed day under the Ceiling Act. That apart section 5(3) of the said Act will have to be given its due place in view of section 42 of the Act inasmuch as section 42 makes the provisions of this Act effective notwithstanding anything inconsistent in any law for the time being in force. Mr Vaikil therefore rightly submitted that the sale deed in favour of the developers was void and that being so, no rights would spring therefrom. In the light of the above discussion, there is no error whatsoever either substantially or procedurally in the order passed by the State Government under section 65 of the Planning Act. The Special Civil Application therefore stands rejected. There will be no order as to costs.

10 The other connected matter, namely, Civil Revision Application No.727 of 1995 arises out of two suits which are filed by the developers and the society and which are pending before the learned Civil Judge (Senior Division), Ahmedabad (Rural) at Mirzapur. The society has filed Regular Civil Suit No.621 of 1994 in that court praying for restraining the developers from disturbing its possession of the newly numbered plot no.51 which, according to them, was in their possession from 4th May 1994. This suit was filed on 31st August 1994 and an ad interim injunction was obtained therein. A cross suit was filed by the developers against the society bearing Civil Suit No.655 of 1994 seeking to restrain the society from interfering with the alleged possession of the developers. In the suit filed by the society, the learned trial Judge directed the society to maintain the status quo whereas in the suit filed by the developers their interim application came to be allowed. Being aggrieved by these two orders, the society filed Civil Misc. Appeals Nos.161 and 162 of 1994. Civil Misc. Appeal No.161 of 1994 was directed against the order passed in Civil Suit No.621 of 1994 whereas Civil Misc. Appeal No.162 of 1994 was directed against the order passed in Civil Suit No.655 of 1994. The learned 2nd Joint District Judge, Ahmedabad, who heard both these appeals together came to the conclusion that the society was in possession of the concerned land lawfully. The learned Judge therefore allowed the society's appeal being Civil Misc. Appeal No.161 of 1994 and directed the developers not to interfere with the possession of the society of final plot no.51. As far as the other appeal is concerned, it was partly allowed and the order passed in Suit No.655 of 1994 was modified but still the society was directed to maintain status quo with respect to this particular plot of land. The society is aggrieved with this later portion of this order and hence this civil revision application has been filed.

11 Mr Bhatt, learned counsel appearing for the society, has pointed out that the society had been allotted final plot no.51 in pursuance of the scheme framed by the State Government in its authority under the Planning Act. He submitted that under section 52(1)(iii) of the said Act while framing a preliminary scheme the Town Planning Officer has a right to provide for the transfer or partial transfer of any right in a original plot to a final plot. Once such preliminary scheme comes into force, all the rights in the original plot get determined and all lands concerned in the scheme vest absolutely with the appropriate authority. He also

submitted that under section 65(3) of the said Act from the date of the notification by the Government sanctioning the scheme, the final scheme has an effect as if it were enacted in the Act. Sections 65 and 67 read as follows:

"65. (1) On receipt of the preliminary scheme or as the case may be the final scheme, the State Government may--

(a) in case of a preliminary scheme, within a period of two months from the date of its receipts and

(b) in the case of a final scheme, within a period of three months from the date of its receipt,

by notification, sanction the preliminary scheme or the final scheme or refuse to give sanction, provided that in sanctioning any such scheme, the State Government may make such modification as may, in its opinion, be necessary for the purpose of correcting as error, irregularity or informality.

(2) Where the State Government sanctions the preliminary scheme or the final scheme, it shall state in the notification--

(a) the place at which the scheme shall be kept upon for inspection by the public, and

(b) a date (which shall not be earlier than one month after the date of the publication of the notification) in which all the liabilities created by the scheme shall come into force:

Provided that the State Government may from time to time extend such date, by notification, by such period, not exceeding three months at a time, as it thinks fit.

(3) On and after the date fixed in such notification, the preliminary scheme or the final scheme, as the case may be, shall have effect as it it were enacted in this Act.

67. On the day on which preliminary scheme comes into force--

(a) all lands required by the appropriate authority shall, unless it is otherwise determined in such scheme, vest absolutely in the appropriate authority free from all encumbrances;

(b) all rights in the original plots which have been reconstituted into final plots shall determine and the final plots shall become subject to the rights settled by the Town Planning Officer."

Mr Bhatt therefore submitted that the society had been issued an order by the AUDA on 4th May 1994 permitting it to enter into the concerned plot of land. He further drew my attention to the fact that way back on 29th June 1987 the competent officer under the Ceiling Act had taken the possession of the concerned land by necessary panchnama and that the same is reflected in the order of the competent authority dated 21st August 1992, a copy of which is endorsed to the original owner, Gangaram Suthar. Mr Bhatt therefore submitted that the land was in possession of the Urban Land Authority right from 1987 and the planning authority, by its order dated 4th May 1994, had permitted the society to enter into that plot of land. It had entered therein in May 1994 without any obstruction and it was only when it feared disturbance by the developers that it had to file the suit.

12 Mr Patel, learned Senior Counsel, appearing for the developers, on the other hand, submitted that it is only because the developers obtained an order of ad interim relief on 31st August 1994 in Special Civil Application No.14348 of 1993 that it was at that stage that the society had entered the plot of land with the help of the police which was also not taken in an authorised manner. Thereafter to protect its occupation a suit was filed by the society. Mr Bhatt vehemently denies the allegations. Mr Patel submitted that the developers were very much in possession of the concerned plot of land and it was necessary to give them a notice under the provisions of Section 68 and 69 of the Town Planning Act. Mr Patel further submitted that the entry of the society into particular plot of land was illegal and was not by a due process of law. These developments, namely, the obtaining of ad interim order by the developers in Special Civil Application No.14328 of 1994 on 31st August 1994, the filing of the said suit on that very day and obtaining the injunction are contemporanious and Mr Patel therefore tried to press in service these

facts to buttress his argument. It is however too difficult to accept that the society moved so fast on receiving the injunction in the writ against it and filed the suit on the very day to obtain an injunction therein against the developers and then moved into the plot. If that was so, they would have been prevented from doing so in view of the injunction granted by the High Court. This shows on the contrary that the society was already in possession prior to the injunction of the High Court. Mr Patel submitted that any such entry into any property without the compliance with Sections 68 and 69 of the Planning Act, if permitted by law, will lead to chaos. The submissions of Mr Patel are well taken in generality and there can be no dispute with regard to the general proposition. In the instant case, however, it is very difficult to say that the developers were in factual possession of the concerned plot of land. No such paper correspondence can create a possession on land particularly inasmuch as there are documents to the contrary showing that way back in 1987 by a proper panchnama the urban land authority had taken the possession. There is no case with respect to title in favour of the developers. As stated earlier, they claim to have purchased the land after the framing of the preliminary scheme and also during the period when the embargo under section 5(3) of the Ceiling Act was operating. That document of purchase being void, abinitio, no rights can spring therefrom. In these facts of the case, in my view, the findings of the learned Appellate Judge that the society was in lawful possession of the concerned plot of land deserves to be sustained. Having come to that conclusion the learned Judge was however in error in the operative part of the order which he passed in the Appeal No.162 of 1994 wherein he directed the society itself to maintain the status quo. There was no reason to restrain the society from proceeding with its construction inasmuch as it has lawfully obtained the possession of the land in question under the Planning Act.

13 In this C.R.A. Rule had been earlier issued on 5th May 1995 by my brother N.J. Pandya, J. and it had been made returnable for 22nd June 1996. In view of the discussion made above, Rule is made absolute and the order of the learned 2nd Joint Civil Judge (Senior Division), Ahmedabad (Rural) at Mirzapur, in Civil Misc. Appeal No.162 of 1994 dated 23rd March 1995 is quashed and set aside to the extent it directs the society to maintain status quo. The said appeal of the society being Civil Misc. Appeal No.162 of 1994 is hereby allowed. The order passed by the Civil Judge (S.D.)

below exh.5 application in Special Civil Suit No.665 of 1994 is hereby set aside. As far as the other order passed in Misc. Civil Appeal No.161 of 1994 is concerned, it is hereby confirmed. There will be no order as to costs.

14 Mr A.J. Patel for the developers seeks a stay of this order for some time to enable them to take further steps. Mr Vakil and Mr Bhatt have objected to this request but thereafter they have left it to the discretion of this Court. It is therefore directed that this order will not become effective for a period of 6 weeks hereof on the condition that both the parties will maintain status quo in the meanwhile.

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